

U N I T E D S T A T E S

v.

Brian P. Hickerson
SSgt (E-6), U. S. Marine Corps
Sixth Marine Corps Dist.
MCRD/ERR
Parris Island, SC

MOTION FOR APPROPRIATE RELIEF
(Recusal)

(8 February 2011)

1. Nature of Motion. This is a motion to recuse or disqualify Major C. M. Brannen as trial counsel because he is the Director, Depot Law Center, MCRD Parris Island, and that creates a conflict of interest with Staff Sergeant Hickerson's military counsel.

2. Facts.

- a. Major Brannen is the Director, Depot Law Center, MCRD Parris Island. In that role he is the administrative supervisor of both trial and defense counsel. For the purpose of this motion the defense assumes that when Major Brannen is absent, decisional authority resides with the SJA. There does not appear to be evidence that Captain Magee is designated the "Deputy Director."
- b. Captain Magee is assigned as the Military Justice Officer and senior trial counsel at the Depot Law Center, MCRD Parris Island and has been detailed to this court-martial as trial counsel.
- c. Captain Trysten Coffey is detailed military defense counsel; she is as a defense counsel at the Depot Law Center, MCRD Parris Island. She was detailed by Major Brannen through his delegation of authority to Captain Green the senior defense counsel. See Para. 2001.5., MCO P5800.16A, and the attached delegation of authority from Major Brannen.
- d. Major Brannen is not a rater or senior rater on Captain Coffey's fitness reports. However, he has significant military control over Captain Coffey: assignment to duties within the Law Center, administrative controls impacting her performance of duty and personal needs, and the potential for influence in making reports to

the Regional and Chief Defense Counsel. See generally, Para. 2003.2., MCO P5800.16A.

3. Discussion.

Service as a trial counsel requires that individual(s) to be a partisan representing the government's interests against Staff Sergeant Hickerson. Conversely service as a defense counsel requires the counsel to be a zealous advocate for the client without fear of adverse consequences. A situation where a counsel might or might be seen to equivocate in representation presents a potential for actual or a perceived conflict of interest. Based on the apparent organizational set-up the Director of the Law Center ought to be in the position of managing, leading, and mentoring Marines in a neutral non-partisan role.

When the Director of the Law Center assigns himself as trial counsel on a case he becomes a partisan advocate on behalf of the government and against one of his own counsel he is required to supervise. That leads to a concern. Paragraph 2000.3., MCO P5800.16A, counsels that:

If Marines entertain doubts about the fairness of the military justice system or the way it is administered, confidence in the Marine Corps would be undermined.

Not only is it the Marine's confidence lessened but the public perception of justice is at risk. It is a bedrock principle of our military justice system that it not only be a fair system of criminal justice, but that it always be perceived as fair. "[J]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954) (Frankfurter, J.).

In reality those who look at the system are "the public," not just the civilian population but also the rank and file of the services. In this sense all Marines not involved in the case comprise part of the "public." Most service-members have little or no direct contact with the military justice system, so their perspective is very similar to that of the civilian public and for purposes of this analysis may be regarded as essentially the same. The appearance and perception doctrine is not "limited in its application to situations which have already been publicized. We believe that the appearance doctrine was devised to insure that public confidence in the military justice system would not

be undermined by the appearance that the accused was prejudiced by unlawful command influence in a given case if that case were subjected to public attention." *United States v. Cruz*, 20 M.J. 873, 882 (A.C.M.R. 1985) *Cf. United States v. Berry*, 20 C.M.R. 325, 330 (A.B.R. 1956); *United States v. Thompson*, 14 C.M.R. 38, 41 (A.B.R. 1954).

The issue of judge advocate supervision of defense counsel has become more of a significant issue in light of *United States v. Lee*, 66 M.J. 387 (C.A.A.F. 2008), and to some extent *United States v. Hutchins*. Right or wrongly people can see how *Lee* and *Hutchins* may be emblematic of an organization in search of true actual and perceived defense counsel independence. The Director of the Law Center appearing as trial counsel in this or any other case presents that clear concern of conflicting interests.

The potential for a conflict of interest is not removed by Staff Sergeant Hickerson having retained civilian counsel. Such a "remedy" or conclusion would seem to promote the need for Marines to retain civilian counsel at their own expense. While civilian counsel might appreciate this added incentive to hire them, that is not how the system ought be designed or executed. Judge Ryan in *Lee* correctly points out that - on appeal - defense counsel effectiveness at trial is viewed by looking at the team's performance as a whole. That's an appropriate view - on appeal - when reviewing for prejudice under Article 59(a), UCMJ. We are raising the issue before trial has begun. Looking at the posture from Judge Ryan's perspective we are in a situation where Staff Sergeant Hickerson may be 50% represented by an attorney who is conflicted, but if the situation persists we may not know that until too late. Staff Sergeant Hickerson has the right to 100% effective effort from both counsel.

The fact that Major Brannen does not currently rate Captain Coffey, as was the situation in *Lee* is of no real consequence. The point is that it is possible that the day after Staff Sergeant Hickerson's trial Captain Brannen could be moved to be a legal assistance attorney or trial counsel and change the rating scheme. This is a real not a remote possibility compared to a situation where a defense counsel may have a former trial counsel as their rater in a future assignment in their mutual careers. The fact that unlike *Lee* the conflict is not so dramatic is little comfort to an accused, his family, or the public.

To the extent there is an actual or perceived conflict of interest the remedy is to remove Major Brannen as trial counsel. Staff Sergeant Hickerson has an existing attorney-client relationship with Captain Coffey. He should not be required to forgo that representation when the recusal of Major Brannen is an easy straightforward action. To do so is effectively a severance of the existing attorney-client relationship without good cause. R.C.M. 505(d)(2)(B). A defense counsel may only be released or relieved for "good cause," whereas the trial counsel can be changed "without showing cause." R.C.M. 505(d)(2)(1). The defense does not believe that the current situation presents good cause for severance of the attorney-client relationship. Such a practice could lead to mischievous results. This issue is being raised at arraignment, the first Article 39(a), UCMJ, session. It's the defense understanding that Major Brannen would be assistant, not lead, counsel. Action is being taken early in the case and there is no foreseeable detriment to the prosecution's opportunity to prepare. The defense is not here to redesign the provision of defense counsel services in the Marine Corps. However, it is clear that the circumstances have been created by the Marine Corps and not by Staff Sergeant Hickerson. He should not be the one to suffer because of Marine Corps organizational and manpower issues. "The practice of having the administrative superior of the trial defense counsel also serve as trial counsel has been condemned," in the past. *United States v. Ley*, 20 M.J. 814, 815 (N.M.C.M.R. 1985).

Lee and a number of other cases discuss the need for an appellant to show prejudice. See e.g., *Lee*, 66 M.J. 387 (Ryan, J., dissenting); *United States v. Nicholson*, 15 M.J. 436 (C.M.A. 1983); *United States v. Hubbard*, 20 C.M.A. 482, 43 C.M.R. 322, 324 (1971). However, those cases are inapposite to the case for consideration because the issue in those cases was raised after trial while on appeal. Based on the law an appellate case which finds error can be resolved using a harmless error analysis. The difference is that Staff Sergeant Hickerson is raising this issue now at the beginning of the case without waiting to find out after trial whether or not his counsels' performance has been deficient, affected by a conflict of interest, and prejudicial.

4. Evidence.

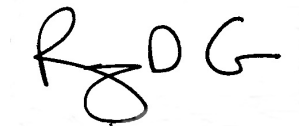
- a. Director, Depot Law Center ltr 5800 SJA 2 Dec 2010.

5. A hearing and oral argument is requested, unless the prosecution agrees with the defense position and Major Brannen does not detail himself as trial counsel or act as trial counsel or a partisan advocate in this case.

6. Relief requested. That Major Brannen be recused as trial counsel in this case and that he be limited in his role to that of a non-partisan supervisor and administrator as contemplated in his position as Director of all Marine judge advocates assigned to the Law Center.

7. Service. Copy provided the court and counsel on 9 February 2011, by email.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "P D G" with a stylized flourish underneath.

Philip D. Cave



UNITED STATES MARINE CORPS

Office of the Staff Judge Advocate
Marine Corps Recruit Depot/Eastern Recruiting Region
Parris Island, SC 29905

IN REPLY REFER TO:
5800
SJA
2 Dec 10

From: Director, Depot Law Center
To: Captain James M. Green, USMC

Subj: DELEGATION OF DEFENSE COUNSEL DETAILING AUTHORITY FOR
MARINE CORPS RECRUIT DEPOT (MCRD)/EASTERN RECRUITING
REGION (ERR) PARRIS ISLAND, SOUTH CAROLINA

Ref: (a) RCM 503, MCM (2008 ed.)
(b) MCO P5800.16A (LEGADMINMAN)
(c) JAGINST 5800.7E (JAGMAN)
(d) MCO P1900.16F (MARCORSEPMAN)

1. Courts-Martial.

a. MCRD/ERR PISC commands. You are delegated authority and duty as Senior Defense Counsel (SDC) to detail MCRD/ERR PISC defense counsel (DC) to each MCRD/ERR PISC accused before a general and special courts-martial and Article 32 investigations, per the references.

b. Co-detailing. Submit requests to detail a second DC to one accused to the SJA for approval, with justification.

2. Pretrial Confinement/Arrest. You are also delegated authority and duty as SDC to detail MCRD/ERR PISC DC to each MCRD/ERR PISC Marine or Sailor who has been in arrest or pretrial confinement for 10 days or more, regardless of whether charges have been preferred, per reference (b).

3. Individual Military Counsel (IMC). Submit IMC requests to the convening authority via the trial counsel per paragraph 0131 of reference (c).

4. Administrative Boards. Counsel for respondents at Administrative Boards will be appointed per paragraph 6304.3 of reference (d).

5. External Commands. Submit requests for defense support to non-MCRD/ERR PISC commands to the SJA for approval, with justification and your estimate of supportability.


C. M. BRANNEN